

§ 255.1

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do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See § 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See § 255.1(b) regarding the "good reason to believe" requirement.](d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of § 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, "We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best." The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of § 255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is "clinically proven" to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the

product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See § 255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experi-

ence is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.^{105/}

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

^{105/}The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either "Results not typical" or the stronger "These testimonials are based on the experiences of a few people and you are not likely to have similar results." Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.